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IN THE

Supreme Court of the United States

October Term, 1959

No. 601

HORTON & HORTON, INC.,

Petitioner,

against

THE STEAM TANKER ROBERT E. HOPKINS, and TIDE WATER ASSOCIATED OIL COMPANY, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This case involves only matters of fact in a simple fog collision case between vessels navigating the Houston Ship Channel, facts found by the District Court on abundant, indeed undisputed evidence, and expressly stated by the Fifth Circuit Court of Appeals not to have been "clearly erroneous". The Court of Appeals also said, "there was such an abundance of evidence to support each finding made by the district court that we see no point in a detailed discussion of the testimony." (Apdx. to petition, p. 31).

The clear, explicit Findings of Fact of the District Court, thus approved by the Court of Appeals, are printed

at pages 36 and 37 of the appendix to the petition. Upon these facts the three vessels involved in the collision, the barge No. 121, the tug MAYE, which had that barge in tow, and the tanker ROBERT E. HOPKINS were found and held by both the District Court and the Court of Appeals to have been guilty of faults contributing to the collision. The District Court divided the damages equally between libellant-petitioner, owner of both the barge and the towing tug, and Tidewater Oil Company, owner of the tanker; but on well-settled principles[1] of admiralty law the Court of Appeals modified the District Court's decree so as to divide the damages, on the basis of *in rem* principles, to be borne and paid two-thirds by the libellant-petitioner, owner of both the barge and the tug, and one-third to respondent, owner of the tanker (Opinion, Court of Appeals, Apdx. to petition, p. 35).

Argument

Petitioner here endeavors, on purely factual matters, as it endeavored in the Court of Appeals both in its original brief and argument and in its petition for rehearing, to fix sole fault on the tanker. In so doing petitioner ignores the findings of separate faults of the barge and its towing tug for violations by each of these two vessels of statutory navigational rules. These violations were specifically found by the District Court and the findings expressly approved by the Court of Appeals. Such violations, under well-settled principles, required the libellant-petitioner affirmatively to establish that they not only did not contribute to the collision, but that they could not have contributed (*The Pennsylvania*, 86 U.S. 125, at 136). That burden libellant-petitioner not only did not, but could not, meet. Its brief herein deals extensively, if not exclusively, with fault of the tanker HOPKINS (a matter not disputed here or in the Court of Appeals) but ignores the distinct, separate faults and statutory violations of both the barge No. 121 and its towing tug MAYE.

[1] *The Eugene F. Moran*, 212 U.S. 466; *The Socony No. 123*, 74 F. 2nd 536 (2d Cir. 1935).

Petitioner's first "question presented" (Pet. p. 2); and its "Statement" (Pet. pp. 3 to 7); and "Reasons for Granting the Writ" (Pet. pp. 7 to 19) in a strained, tortuous, factual recital, suggests that because the tanker Hoskins was equipped with radar there is something unique in the case which deserves the attention of this court. Petitioner (brief pp. 9 to 16) refers to newspaper articles concerning six vessel collisions in which one or the other, or both vessels were equipped with radar. All but one of these collisions were in deep sea waters where, unlike the instant case, the International Rules (33 U.S.C., 143, *et seq.*) apply. The other case, *The Jacob Luckenbach-Hawaiian Pilot*, involved a collision in San Francisco Bay. The instant case of a collision in the Houston Ship Channel involves the Inland Rules (33 U.S.C. Sec. 151, *et seq.*), and the Coast Guard Pilot Rules, promulgated pursuant to Act of Congress, and having the force of statutory law. None of these six collisions to which petitioner refers have any remote resemblance on their facts to the case at bar. It might be imagined from petitioner's first "Question Presented" and the data in petitioner's brief with respect thereto, that proper use or the effect of radar in vessel fog collision cases has not had the attention of the courts, or of the Coast Guard. Such is far from the fact.[2]

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[2] For example, the following cases, among numerous others, in the admiralty courts of United States, England, and Canada, dealt with the use of radar in fog collision cases: *The Medford*, 65 F. Supp. 622 (E.D.N.Y. 1946); *The Davila-The Wilkes*, 88 F. Supp. 158 (D.C. Mass. 1950); *The Duke of York-The Haiti Victory*, 131 F. Supp. 712 (E.D. Va. 1955), aff'd 230 F. 2nd 139 (4th Cir. 1956), aff'd on limited question of pleading, 352 U.S. 821; *The Isaac T. Mann-The Esso Aruba*, 94 F. Supp. 486 (D.C. Mass. 1950); *The Meteor*, 121 F. Supp. 830; *The Chusan*, 2 Lloyd's List L.R. 685 (Adm. Div. 1955); *The Esso Plymouth*, 1 Lloyd's List L.R. 429; *The Southport*, 82 Lloyd's List L.R. 862; *The Anna Salen*, 1 Lloyd's List L.R. 475; *The Prins Alexander*, 2 Lloyd's List L.R. 1; *The Chinook-The Daimar Salen*, (Supreme Court of Canada) 1951 A.M.C. 1253. See also Patel Discussion of the United States Coast Guard held during Convention of The Propeller Club on October 16, 1947 with the Commandant of the Coast Guard as

Petitioner (brief p. 8) endeavors to avoid, with the gratuitous statement that the decision is "clearly wrong", the holding of Chief Judge Roche of the District Court Northern District of California, in *Weyerhauser Steamship Co.* v. *United States*, 174 Fed. Sup. 663 (1959.) Petitioner says this is the only decision on its first question presented (a question, we repeat, quite unnecessary on the facts of the case at bar). Contrary to petitioner's comment that the decision is "clearly wrong", we submit it is quite correct; and it still remains the law, for it has not either been modified or reversed, and we are advised by the attorney for the libellant in that case that it has not been appealed. Judge Roche's decision, on the facts before him in the *Weyerhauser* case—a deep sea collision involving the International Rules—held that the ascertainment by radar of the position of the vessels when they were 2.8 miles apart (Opinion p. 665) was "adequate justification" for not stopping a vessel's engines under International Rule 16.[1] In the instant case, we submit that the tanker HOPKINS was not required to stop her engines when the barge No. 121 and her towing tug MAVE were observed by

Chairman, and the Chairman of the Coast Guard Merchant Marine Council, as Co-Chairman, copy of which will be furnished on request.

[1] *International Rule 16*: 33 U.S.C. Sec. 145m: "Rule 16 (a) Every vessel, or seaplane when taxiing, on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.

(b) A power-driven vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Inland Rule Article 16: 33 U.S.C. Sec. 192: "Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

radar at the distance of 1½ miles (R. 277) when the tanker's speed was reduced (R. 205) and had been reduced to either 1½ or 3 knots (R. 227, 228), obviously no more than bare steerageway. The tanker HOPKINS has, however, been held at fault for other reasons, and her fault is not contested. She was held at fault for proceeding at excessive speed under the circumstances, failing to navigate with sufficient caution, failing to keep a proper lookout, and forefailing to stop immediately upon hearing fog signals ahead after knowing the presence but not the position of vessels ahead in the channel. What petitioner here does is to take issue with the lower courts' failure also to find more specifically that the HOPKINS was at fault in failing to stop her engines when the presence of the tug MAYE, a mile and a half ahead, was revealed by the HOPKINS' radar. Even if such a specific finding were made (assuming for discussion, contrary to the *Weyerhauser* case, that such failure was in fact a fault), such a finding would do no more than cast the respondent for the share of damages for which the respondent and its tanker have already been held. So petitioner's contention that a radar observation by the tanker HOPKINS involves a question for this Court under Article 16 of the Inland Rules (similar to Rule 16 of the International Rules in the *Weyerhauser* case) is untenable in any view of the matter.

Petitioner's second "question presented," whether the doctrine of last clear chance is applicable in admiralty, also does not warrant any attention by this Court, for concededly the doctrine is applicable in maritime collisions. When libellant-petitioner's barge No. 121 and towing tug MAYE disappeared from the HOPKINS' radar screen, the HOPKINS was entitled to navigate in the belief and on the theory that the MAYE and her barge would correct their improper position in the channel before the three-quarters of a mile then separating them from the HOPKINS was closed. The barge 121 and the MAYE were at fault, among other

matters, found below "in violating the narrow channel rule," i.e. in being on the wrong side, their own port side, of the 400 foot wide channel, and blocking the channel by being across it with a tow measuring 260 feet (D. C. Opinion, Pet. Apdx. p. 37; Ct. Appeals Opinion, Pet. Apdx. p. 50). Further, the HOPKINS had no reason to believe the MAYE, hearing the HOPKINS' fog signal, would continue on the wrong side of the channel; nor had the HOPKINS any reason to believe that the MAYE would turn her tow broadside across this narrow channel, and violate the statutory rules of the road in the respects found by the District Court and the Circuit Court of Appeals. As Mr. Chief Justice FULLER said in *The Victory*, 168 U.S. 410, 426, each of these vessels "was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her own course would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel."

As to petitioner's third question, we have already (p. 2, footnote 1 hereof) cited authorities that the division of damages, one-third to each of the three offending vessels held in fault, irrespective of their ownership, is in accord with settled law. It has properly, on an abundance of evidence, been held by both the District Court and the Court of Appeals that not only the tug MAYE but the barge No. 121 were each guilty of separate statutory violations. *Boston Metals Co.* v. *The S S Winding Gulf*, 349 U.S. 122 (cited by petitioner, brief p. 24) has no bearing on the instant case. The question before this Court in the *Boston Metals* case involved liability of a tug and her owner for negligent damage to the tow under a special form of towage contract which sought, in direct conflict with the true facts, to make the tug crew on board their own vessel the agents and servants of the tow, which was of different ownership.

Petitioner (brief bottom p. 24) states that the decision of the Court of Appeals in the instant case "is directly

contrary to the rationale of the holdings of this Court in *Sturges* v. *Boger*, 65 U.S. 110," and other cases cited. That is not so. The rationale of *Sturges* v. *Boger*, and the many cases following it, is that a vessel in tow must answer for its own independent faults, though neither the tug nor the tow must answer for independent, separate faults of the other. In the instant case, on facts abundantly established, with nothing to the contrary, and findings of the District Court expressly approved by the Court of Appeals, both the tug MAYE and the barge No. 121 were guilty of independent, separate faults, and under *The Eugene F. Moran*, 212 U.S. 466, and *The Socony No. 123*, 73 F.2d 536 (2d Cir. 1935) both the barge No. 121 and the tug MAYE must bear their proper share of the damages, one-third each, or two-thirds to the owner of these two vessels; the tanker HOPKINS and her owner bearing the remaining one-third.

Contrary to petitioner's statement (brief p. 25) that the Court of Appeals decision in the instant case is in conflict with *The Lizzie M. Walker*, 3 F.2d 921 (4th Cir. 1925) and *The John D. Rockefeller*, 272 Fed. 67 (4th Cir. 1921), there is no conflict. In *The Lizzie M. Walker*, the Fourth Circuit Court of Appeals in dicta said that the owner of an unmanned barge has an obligation to furnish a seaworthy vessel, and the barge in that case was unseaworthy for failure to be equipped with and display the lights required by statute. So was the barge No. 121 in the instant case. *The John D. Rockefeller*, 272 Fed. 67, illustrates and follows the doctrine laid down by this Court in *Sturges* v. *Boger*, 65 U.S. 112, and *The Eugene F. Moran*, 212 U.S. 466, to the effect that neither tug nor tow is liable for independent faults of the other.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 14, 1960

Respectfully submitted,

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